UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 257—September Term, 1966.

(Argued December 15, 1966 Decided August 23, 1967.)

Docket No. 30615

RANDOLPH PHILLIPS,

Plaintiff-Appellant,

—v.—

JOHN D. MURCHISON,

Defendant-Appellee.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeal in diversity action from orders entered in the United States District Court for the Southern District of New York, Dawson, *J.*, and Ryan, *Ch.J.*, dismissing all fourteen counts of plaintiff-appellant's amended and supplemental complaint. The portions of the orders that are appealed are in part affirmed and in part, as to counts 1, 2, and 12, reversed for further proceedings below.

RANDOLPH PHILLIPS, New York City, *Plaintiff-Appellant, pro se.*

STUART N. UPDIKE, TOWNLEY, UPDIKE, CARTER & RODGERS, J. HOWARD CARTER, LEE W. MEYER, RONALD S. DANIELS, ANSON M. KELLER, New York City, *for Defendant-Appellee.*

PER CURIAM:

Appellant, who commenced this diversity action in the United States District Court for the Southern District of New York, alleging he had suffered defamation and other wrongs at the hands of the defendant, appeals from orders adverse to him entered below by Judge Dawson and by Chief Judge Ryan. His amended and supplemental complaint contains fourteen counts. Judge Dawson dismissed counts 1 through 5, and counts 8, 13, and 14, as failing to state claims or causes of action upon which relief could be granted.

Appellant has taken no appeal from the dismissal of two of these counts, counts 4 and 5.

Defendant-appellee Murchison some months later moved for summary judgment in his favor and, upon consideration of the motion, Chief Judge Ryan granted a final appealable judgment for appellee. He did not disturb Judge Dawson's disposition of the counts that Judge Dawson had dismissed and he dismissed the remaining six counts, counts 6, 7, 9, 10, 11, and 12. Thereafter appellant timely appealed these determinations (except from the dismissal of counts 4 and 5).

We of the majority are in complete agreement with the position taken by our brother Moore in his dissenting opinion that the dismissal orders entered below as to counts 3, 6, 7, 8, 9, 10, 11, 13, and 14 should be affirmed. Moreover, we of the majority do not cavil with the statement of facts underlying these proceedings and the factual references to

the history of the Alleghany litigation as he has set them forth, and therefore we do not find it necessary to discuss for ourselves that dramatic backdrop to the Phillips action.

We of the majority consider that we are required to hold that counts 1, 2, and 12 are properly pleaded, and that they set forth claims upon which relief could be granted.

Succinctly stated, it is our understanding that under the latest New York state judicial pronouncements made in *Williams* v. *Williams*, 27 App. Div. 2d 530, 275 N. Y. S. 2d 425 (2d Dep't 1966), and in *Chappelle* v. *Gross*, 26 App. Div. 2d 340, 274 N. Y. S. 2d 555 (1st Dep't 1966), decisions handed down subsequent to the orders appealed from here, those orders as to counts 1, 2, and 12 must now be reversed. Our brother Moore distinguishes these cases and relies upon New York trial bench decisions by New York State Justices Streit and Silverman in a collateral action brought by Phillips in the New York courts. Portions of these decisions are quoted in the dissenting opinion.

It would seem that these decisions by Justices Streit and Silverman handed down in the action Phillips brought in the New York courts are in line with the traditional New York law relative to allegations which must be set forth in complaints seeking damages for malicious prosecution and abuse of process, but the two recent Appellate Division decisions indicate a change in the rule.

In *Chappelle* v. *Gross, supra*, the court dividing 3-2 held that a complaint alleging that "the institution of the suit, with its accompanying *lis pendens*, was willful, malicious and without probable cause, with intent to injure the plaintiffs and to prevent them from conveying title to others with whom plaintiffs had a valid written contract of sale" was sufficient to survive a motion to dismiss. The *lis pendens* is a provisional remedy but a very mild one which

affords little interference with person or property compared to arrest, attachment, etc., and the case thus seems to be a weakening of the requirements of interference with person or property.

Soon after the *Chappelle* case was decided by the First Department, the Second Department handed down the decision upon which Phillips heavily relies, *Williams* v. *Williams, supra.* In that case, also by a divided court, 3-2, the court upheld a complaint alleging that an action was instituted "not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plaintiff's business reputation . . . " despite the absence of any allegation of interference with plaintiff's person or property. The case is also important here because it draws the distinction, a distinction not apparent on the face of the New York Civil Rights Law §574, between, on the one hand, a litigant's publication of a complaint to news media which media may if they wish abstract a true and fair report for further news publication, and, on the other, his direct publication of a complaint to private individuals.

Applying the principles of the *Williams* case to the various counts of Phillips's complaint, it is clear to us that counts 1 and 2 must be upheld. The allegations made by Phillips in counts 1 and 2 of his amended and supplemental complaint are not dissimilar to those alleged in *Williams* v. *Williams, supra.*

The court in *Williams* described the plaintiff's allegations as follows:

> Liberally construed, the first cause of action alleges that defendant Robert W. Williams caused a corporation to institute a false, defamatory action against plaintiff, not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plain-

> tiff's business reputation by widespread publication of the accusations made against plaintiff in that action; and that both defendants accomplished such improper purpose by deliberately and maliciously mailing copies of the defamatory complaint to many others in plaintiff's trade. 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 426.

It held that these allegations sufficiently pleaded a cause of action for abuse of process or, if not abuse of process, at least "a cognizable tort for which the law will provide a remedy." 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 426.

Counts 1 and 2 of Phillips's complaint allege, *inter alia,* that one Jesse Holland, acting as an agent of defendant John D. Murchison, filed a verified complaint in the name of plaintiffs who did not know anything about the subject matter of the action, and that the complaint charged Phillips with "perpetrating fraudulent and conspiratorial acts" with regard to the settlement of two derivative actions, involving Alleghany Corporation, that the complaint was sham (and indeed was subsequently stricken as such in a reported decision of the District Court for the Southern District of New York, *Freeman* v. *Kirby,* 27 F. R. D. 395 (SDNY 1961)), that it was filed "in furtherance of a conspiracy maliciously to use the process of this Court . . ." to injure Phillips, and that the contents of the complaint were published to various news media by Holland. Count 1 states that these acts constitute a malicious use of process, and count 2 states that they constitute an abuse of process.

As in *Williams,* these allegations sufficiently plead abuse of process or some other tort because they charge the "misuse of legal process to accomplish an improper, collateral purpose (citing cases)." 27 App. Div. 2d at ——, 275

N. Y. S. 2d at 426. Inasmuch as that case, the best available current authority on New York law, holds that an interference with a plaintiff's person or property is not a necessary allegation in an abuse of process or malicious prosecution complaint, counts 1 and 2 state a cause of action under New York law.

As we have stated, the court is unanimous that counts 6, 7, 9, 10, and 11 were properly dismissed. They all involve the publication of the contents of various complaints to various news media, and New York Civil Rights Law §574 is a good defense to such a situation. *Lewis* v. *The Chemical Foundation, Inc.*, 262 N. Y. 489 (1933); *Oglesby* v. *Cranwell*, 250 App. Div. 720, 293 N. Y. Supp. 67 (2d Dep't 1937). Count 12, on the other hand, involved publication of the complaint directly to named individuals, not news media, and we of the majority hold that it states a good cause of action.

The court in *Williams* held that the allegations set forth *supra* were not insufficient as a matter of pleading, before the defendants' answer, to support a claim for libel because the allegations indicated "there was never any 'fair and true report' of the defamatory action by disinterested outsiders, but only the primary and sole publication of it by defendants' malicious mailing, to numerous persons in the trade, of the complaint . . . ." 27 App. Div. 2d at ——, 275 N. Y. S. 2d at 427.

Count 12 of Phillips's complaint alleges, *inter alia*, that Murchison mailed copies of the complaint in an action by Murchison against Phillips and others to various named individuals in Minnesota, Ohio, Illinois, Delaware, and Canada and that the allegations in the complaint were "false, malicious, and defamatory."

We are of the opinion that under *Williams* this allegation sets forth a pleaded cause of action for libel. It is true that in other counts Phillips charges Murchison with causing similar information to be published in various newspapers so that the sole alleged publication of the material was not limited to individual persons, as in *Williams*. However, the *Williams* court could not have intended to allow a defendant, who has brought a lawsuit for "an improper, collateral purpose," to insulate himself from liability for his direct publication of a libel to individual persons by the fact that he also made the statement available to the press.

We recognize that the *Chappelle* and *Williams* decisions upon which we base reversal were by intermediate, not final, state appellate courts, both of which were divided 3-2. However, making our best "estimate" of "what the state court would rule to be its law," *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956) (concurring opinion of Frankfurter, *J.*) we feel required to reverse the judgment as to counts 1, 2, and 12. We are informed that appeals from both the *Chappelle* and *Williams* decisions have been allowed to the New York Court of Appeals, but have no record information as to whether anything further has transpired in those cases in that court. The possibility of waiting for definitive rulings by the Court of Appeals has, of course, occurred to us. However, in view of the length of time that has elapsed since plaintiff filed his complaint, we do not feel justified in delaying our decision indefinitely. If our "estimate" of New York law, as evidenced by those two cases, should prove to be wrong, we are consoled by the knowledge that these remaining three counts will probably not reach trial before the New York Court of Appeals rules, if the appeals are pressed; the trial court, if it deems it advisable to do so, may delay trial for a rea-

sonable period (although allowing pre-trial proceedings to continue in normal fashion) to await guidance from New York's highest court.

We affirm the judgment below except for counts 1, 2, and 12. As to these counts, the judgment is reversed, and the cause is remanded for further proceedings below.

MOORE, *Circuit Judge* (dissenting as to counts 1, 2 and 12):

Randolph Phillips (Phillips), plaintiff-appellant, appeals from a judgment dismissing his amended and supplemental complaint (the complaint). The defendant-appellee, John D. Murchison, was the only defendant served, although his brother, Clint W. Murchison, was named as a defendant in the complaint. Counts 1-5, 8, 13 and 14 were dismissed on motion (Dawson, *D.J.*—opinion unreported); subsequently, on motion for summary judgment and on motion of Phillips to vacate the Dawson order of dismissal, Counts 6, 7, 9, 10, 11 and 12 were dismissed, the motion to vacate was denied and judgment of dismissal entered (Ryan, *D.J.*; 252 F. Supp. 513). The appeal does not include Counts 4 and 5.

The complaint, containing 14 counts, is based upon three legal theories (1) malicious use and abuse of legal process (malicious prosecution); (2) defamation; and (3) violation of certain sections and rules of the Securities Exchange Act of 1934.

The bibliographical material relevant to an understanding of the issues on this appeal is to be found in various opinions which comprise the Alleghany, Kirby, Murchison, Phillips saga (218 F. Supp. 164); *affirmed* 333 F. 2d 327; *affirmed en banc* 340 F. 2d 311; *certiorari granted* 381 U. S. 933; *dismissed* after argument as improvidently granted 384 U. S. 28).

For almost twenty years, a modern War of the Roses has been fought on judicial battlegrounds between the Kirby and Murchison forces. Each side has come to the fray well equipped with all the manpower essential to legal warfare, i.e., astute counsel, financial advisers, and imaginative public relations generals. Over the years, victories have been gained, defeats suffered, but the persistence of the litigants and the always available replacements from the Bar have enabled the war to continue. Anomalously enough, the bitterest battle arose over the treaty of peace. Although not an original combatant, Phillips, wearing neither a white nor a red rose, had kept more than in casual touch with the two camps. He had been a consultant to Brussel in the *Breswick*[1] litigation, to Graubard in the *Zenn*[2] suit, he had participated in the New York Central proxy fight, he had been a participant in discussions relating to a settlement of the stockholders' derivative suits and, in fact, had been regarded as controlling the minority stockholders' litigation. Whether Phillips was primarily responsible for the settlement of the stockholders' suits, he, at least, had an important role. Little wonder then that, when it suited Alleghany's interest to challenge the propriety and fairness of the settlement, charges should be leveled at the principal participants such as are evidenced by the allegation (Complaint par. 44, *Alleghany Corporation* v. *Kirby*, 218 F. Supp. 164, 176) that in return for Phillips' betrayal of his fiduciary duty to Alleghany, its stockholders and others and in return for his advocacy in obtaining for Kirby a settlement favorable to Kirby, Kirby undertook to secure for Phillips a

---

1 *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, S. D. N. Y. 1955.

2 *Zenn* v. *Anzalone*, 17 Misc. 2d 897; 46 Misc. 2d 378, 259 N. Y. S. 2d 747.

directorship in Investors Diversified Services, Inc. (IDS), employment as a consultant by IDS and other emoluments.

On September 7 and 8, 1960, suits were commenced by stockholders on behalf of Alleghany against Allan P. Kirby, Fred M. Kirby, Phillips, Charles T. Ireland, Jr., and others, in substance, to nullify the Kirby settlement releasing him from any liability in the original stockholders' suit.[3] The two main issues in those suits, formulated after pre-trial conferences, were (1) whether there was a corrupt agreement between Kirby, Phillips and Ireland, whereby a settlement was made for an amount far less than otherwise under which settlement Phillips and Ireland personally benefited, and (2) whether Kirby failed to adduce on the court hearings facts material to a proper evaluation of Kirby's liability which were essential to a determination of the fairness and adequacy of the settlement.

The district court dismissed the complaint (Alleghany then under Murchison control had become the plaintiff) finding that Alleghany which had the burden of proof had failed completely to establish a breach by Phillips of a "fiduciary obligation to the minority stockholders in that he made a secret agreement for his own benefit which was not revealed to the Court" (p. 182). The district court then proceeded to find affirmatively that Phillips' directorship on the IDS Board did not warrant the conclusion that this nomination was pursuant to a pre-existing agreement. As to Kirby's alleged failure to produce facts essential to a proper determination of a fair settlement, the district court held that any such failure was not a basis for a collateral attack upon the judgment.

---

3 *Freeman, et al.* v. *Kirby, et al.* (Sup. Ct. N. Y. Co.); *Freeman, et al.* v. *Kirby, et al.* (U. S. D. C. S. D. N. Y.); and *Murchison, et al.* v. *Kirby, et al.* (U. S. D. C. S. D. N. Y.). The *Freeman* suits were dismissed; the *Murchison* suit was tried.

This judgment came before this court for appellate review and was affirmed. 333 F. 2d 327 (1964). No appeal was taken from the district court's finding that there was no fraudulent agreement between Kirby and Phillips.

Piqued by the allegations (aspersions to him) in the September 8, 1960 derivative suit Murchison complaint, Phillips embarked upon a litigious campaign against his erstwhile colleagues, associates, employers and friends (?).

In September 1960, Murchison and others sought by proxy contest to secure for themselves the management of Alleghany then in Kirby's control. Phillips, a paid consultant to Kirby and Alleghany, on February 24, 1961, commenced a derivative action wherein he sought to enjoin a proxy contest. His attempt voluntarily to dismiss this suit being denied by the court, he then served (March 19, 1961), an amended complaint in which he added a charge of libel against Murchison. Over two years later, upon motion for summary judgment, all counts except Count 2 were dismissed. A second amended complaint was also dismissed. Then followed the present amended and supplemental complaint.

The Dawson Opinion

Judge Dawson dismissed Count 1 (malicious use of process), Count 2 (malicious abuse of process), Count 3 (malicious violation of Rule 11, F. R. C. P.), and Count 14 (malicious use and abuse and inequitable and alleged harassment) as failing to state claims upon which relief could be granted. No appeal was taken as to this dismissal.

Count 1 alleged that a suit entitled *Freeman and Manaster* v. *Kirby, Phillips et al.*, in the Federal court was brought "in furtherance of a conspiracy maliciously to use the process of this [Federal] Court and the New York State Su-

preme Court to the injury and damage of plaintiff." A similar suit was brought in the New York State Supreme Court. The suit was a derivative action on behalf of Allegheny and was characterized as seeking relief to obtain a vacatur of the settlement [of other previous lawsuits in the Federal and State courts] as to Kirby only." 27 F. R. D. 395, 396.

Count 2 made the same charges with the conclusory allegation that Murchison was part of a conspiracy "maliciously to abuse the process of this Court and the New York State Supreme Court."

Count 3 alleged a conspiracy maliciously to violate Rule 11 of the Federal Rules of Civil Procedure.

Judge Dawson concluded that it is the law of New York that to sustain a complaint in a civil litigation based on malicious prosecution, there must be an allegation that the plaintiff's person or property was interfered with in connection with the prior proceeding. Because there were no allegations of special circumstances which would take the case out of the general rule of interference with person or property, he dismissed Count 1.

The "abuse of process" count (#2) was found to be defective for the reasons applicable to count 1 and, in addition, because the bad faith alleged was in the institution of the action—not conduct after the action had been commenced.

The Ryan Opinion

Judge Dawson died in August 1964. On November 2, 1965, Murchison moved for summary judgment (Rule 56(b) Fed. R. Civ. P.), dismissing Counts 6, 7, 9, 10, 11 and 12 of the amended and supplemental complaint, and plaintiff moved to vacate so much of the Dawson order dated May 8, 1964, from which no appeal had been taken which had dismissed Counts 1, 2, 3, 8, 13 and 14. Judge Ryan denied

Phillips' motion to review Judge Dawson's dismissal of Counts 1, 2, 3, 8 and 13, and addressed himself to Counts 6, 7, 9, 10, 11 and 12. The court held that there was a judicial proceeding pending at the time of the publications, that New York law applied even to the out-of-state publications (Counts 11 and 12), and that the publications were a fair and true report of the judicial proceeding which they purported to report. Accordingly, the court held that Counts 6, 7, 9, 10, 11 and 12 should be dismissed because the alleged defamations were absolutely privileged under the statute (Sec. 74, *supra*).

While his Federal court action was in progress, Phillips also had pending a suit in the State court based upon similar charges. In *Phillips* v. *Alleghany Corporation,* New York Law Journal, December 29, 1965, p. 16, cols. 6-8), Phillips had made charges against Alleghany of malicious prosecution and abuse of process (Counts 1 and 2 here) based upon the institution of the *Murchison (Alleghany)* v. *Kirby, et al.*, suit in the Federal court. As to the malicious prosecution charge, the court (Mr. Justice Streit, New York Supreme Court) dismissed it, saying:

> "An action for malicious prosecution of a civil proceeding cannot be maintained where there has been no showing that the plaintiff's person or property was the subject of interference in the prior action by a provisional remedy such as arrest, attachment or injunction or otherwise.",

citing *Sachs* v. *Weinstein,* 208 App. Div. 360, wherein the court said (p. 365) that without such interference a

> "defendant, although successful is not entitled to maintain an action for malicious prosecution against the plaintiff, notwithstanding such action may have been

prosecuted without probable cause and maliciously, and resulted in damage to the defendant in excess of the costs recovered by him."

See also *Paul* v. *Fargo*, 84 App. Div. 9.

Dismissing the abuse of process cause of action, the State court said:

"An ulterior motive in the use of court process is not enough. There must be a further act done outside the use of the process, some perversion of the process (*Hauser* v. *Bartow*, 273 N. Y. 370, 374)."

Although the charges in the State Supreme Court case were based upon the Murchison suit, the Freeman suit was no different in theory and the same legal principles apply.

Phillips did not appeal from this decision. Instead he took advantage of leave to replead the fourth cause of action, also dismissed, which added to previous allegations the proxy fight motive.

This amended complaint, the gravamen of which was "that he was sued maliciously and without probable cause in a civil action," was also attacked as insufficient and suffered the same fate. In dismissing it, Mr. Justice Silverman (now Surrogate) held (New York Law Journal, June 8, 1966, p. 17, col. 6) that:

"As a cause of action for malicious prosecution, the complaint is insufficient for failure to allege an interference with plaintiff's person or property by a provisional remedy in the previous action";

that

"[T]here are reasons for the imposition of barriers to maintenance of malicious prosecution causes still recognized as valid in this jurisdiction.";

and that

> "Avoidance of these barriers may not be had by denominating the cause as one of prima facie tort * * *."

Despite no decision by the New York Court of Appeals changing, or even throwing any doubt as to the law as declared in previous decisions, the majority believe that two 3-2 decisions in the First and Second Departments of the Appellate Division of the New York Supreme Court, *Chappelle* and *Williams, supra,* now establish as the law that "an interference with a plaintiff's person or property is not a necessary allegation in an abuse of process or malicious prosecution complaint"—at least they say that this is their best estimate. Of course neither case stands for any such proposition. *Chappelle* involved a definite interference with property, namely, the filing of a *lis pendens; Williams* was based on the allegation that the suit was brought "not with the intention of prosecuting it as a lawsuit, but solely for the purpose of ruining plaintiff's business reputation by widespread publication of the accusations made against plaintiff."

The complaint under consideration in *Williams* was radically different from the complaint before us. On its face, the complaint here shows that the purpose of the action was, in a derivative action on behalf of Alleghany Corporation against Kirby, Phillips and Ireland, to attack the settlement of two other derivative actions brought on behalf of Alleghany (*Zenn* v. *Anzalone* and *Breswick & Co.* v. *Briggs*). In the light of this allegation, which must be accepted for the purposes of this decision, it is clear that the allegations which the court in *Williams* deemed essential are not present here. Nor could they very well be made since Phillips can scarcely allege that there was no

intention to prosecute and that the action was brought solely to ruin his reputation. The requirement of allegations which state a cause of action is not outmoded in these rapidly changing legal times because defendants are still entitled to have plaintiffs prove their charges.

In *Chappelle*, the court held that a complaint alleging that "the institution of the suit, with its accompanying *lis pendens*, was willful, malicious and without probable cause, with intent to injure the plaintiffs and to prevent them from conveying title to others with whom plaintiffs had a valid written contract of sale." was sufficient to survive a motion to dismiss (appeal pending in New York Court of Appeals). Furthermore, the comments in dissent of Mr. Justice Steuer in my opinion state a sounder policy, i.e., "If every successful defendant could turn around and sue the plaintiff and, by a liberal use of the word 'malicious' state a cause of action, a never ending source of new litigation would have a forum. Questions once thought to have been put to rest could be relitigated almost without limit. Judgment should mark the conclusion of the disputes between the parties and not be an invitation to further litigation" (p. 345).

The issues sought to be revived in this action have been litigated and re-litigated. There is no reason to believe that New York law departs from the policy of finality of judgment. Nor is there reasonable expectation that the New York Court of Appeals will reverse the principles well established during the years by the decisions expounding New York law relied upon by Judge Dawson and Justices Streit and Silverman.

The fallacy of the majority is the assumption that the allegations of counts 1 and 2 "are not dissimilar" to those in *Williams*. Even if *Williams* were to change the New

York law as to abuse of process actions and to set new requisites of a valid cause of action, plaintiff will indeed be hard put on any trial to prove (1) lack of intention to prosecute a lawsuit and (2) that the suit was brought "solely" to injure plaintiff. On its face, the complaint reveals that the suit was brought to upset a settlement in a stockholders' derivative suit. In this so-called liberal age of notice pleading, were the old requirement of *allegata et probata* to be sloughed off, plaintiff ought to assume the burden of the "allegata" so that at the end of his case defendant can point to the failure of the "probata."

In short, I would affirm Judge Ryan's judgment in its entirety. Phillips has had his "day" in court. A "day" even in Dickensian law should not be a lifetime.

Judgment of the Court of Appeals docketed on October 20, 1967

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of August one thousand nine hundred and sixty-seven.

Present:

HON. STERRY R. WATERMAN,

HON. LEONARD P. MOORE,

HON. WILFRED FEINBERG,

Circuit Judges.

RECEIVED
OCT 20 1967

Randolph Phillips,
Plaintiff-Appellant

v.

John D. Murchison and Clint W. Murchison Jr., individually and as persons doing business under the firm name and style of Murchison Brothers,

Defendants-Appellees.

DOCKETED AS
A JUDGMENT # 68,912
ON October 20, 1967
AT M.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, except for Counts 1, 2 and 12, and as to those counts, that said judgment be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to the appellant.

A. DANIEL FUSARO
Clerk

By: A. DANIEL FUSARO
Chief Deputy Clerk

A true copy.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORDER DENYING PETITION FOR REHEARING

FILED OCT.20,1967

Randolph Phillips,

Plaintiff-Appellant,

-v-

John D. Murchison,

Defendant-Appellee.

Petition for Rehearing

Randolph Phillips, New York City, Appellant, pro se

Petition denied.

October 19, 1967

S.R.W.

L.P.M.

W.P.

U.S.C.JJ.

Pages Omitted

Record references to pages 1a to 45a are to the complaint as printed in the Appellant's Appendix to the Court of Appeals, copies of which are being filed with the record herein.

APPENDIX B

—315-329—

Memorandum #29939 Filed May 8, 1964

DAWSON, *D.J.*:

This is a motion for dismissal of the complaint under Rule 41(b) for failure to comply with the rules and the orders of this court, or in the alternative, for a dismissal of certain counts under Rule 12(b) for failure to state a claim upon which relief can be granted. The complaint is being attacked for failure to be "simple, concise and direct" (Rule 8(e)), for setting forth events which have happened since the date of the original pleading, without a motion first being made under Rule 15(d), and for setting forth claims which may be barred by the statute of limitations.

The complaint presently under attack is the fourth complaint in this action. The original complaint was filed on February 24, 1961. The second complaint was filed as of right before the original complaint had been answered. This second complaint was dismissed on motion by order of the court on November 1, 1963, with leave to replead count 2. A third complaint was filed on November 7, 1963, and by order of the court on December 5, 1963 was dismissed with leave to replead again. The fourth complaint, now under attack, entitled "Amended and Supplemental Complaint" was filed on January 28, 1964. It contains fourteen counts and two exhibits for a total of thirty-seven pages.

Mr. Phillips has appeared *pro se* in this action. Although he has written a large amount of prose in his complaints, it is very difficult to determine exactly what his claims are. Previous hearings upon his complaint, resulting in the orders above referred to, have been designed to bring the litigation to a point at which the Court can determine exactly what issues are involved. The Court has been very

lenient with Mr. Phillips in trying to instruct him on the necessity of putting his claims in specific and definite form. However, he seems to think that as a *pro se* litigant he can burden the Court with numerous pleadings whose prolixity is exceeded only by their indefiniteness. It is necessary that some definiteness be reached in the pleadings so that the parties may understand them and so that the Court may determine what issues are to be tried when this case is reached for trial. Mr. Phillips may prefer to keep his complaint indefinite so as to use it as a handle for time-consuming and vexatious depositions. This is not the proper function of a pleading.

Mr. Phillips' procedure in this case is typical of the conduct referred to by Judge Kaufman of the Court of Appeals in the endorsement appearing on the order in *Ackert* v. *Bryan,* No. 27240, dated June 21, 1963. In this memorandum of Judge Kaufman, attached to the order, he said, referring to Mr. Phillips:

> " . . . He comes before this Court wearing the cloak of a *pro se* applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which

serve only to distract us from important judicial business. . . ."

The present complaint now contains claims in three main categories, malicious prosecution, defamation, and violation of the proxy rules under the Securities Exchange Act of 1934. I shall discuss these categories and the counts thereunder seriatim.

Malicious Prosecution

In the general area of malicious prosecution, plaintiff Phillips has used four counts to seek recovery for the same act under slightly different legal theories. The act complained of is the instigation of civil actions in this court and in the New York State Supreme Court against Mr. Phillips and others. Count 1 seeks recovery on the theory of "a conspiracy maliciously to use the process of this Court and the New York State Supreme Court." Count 2 adds the slightly different theory of a "conspiracy maliciously to abuse the process." Count 3 more specifically charges a "conspiracy maliciously to violate Rule 11 of the Federal Rules of Civil Procedure." Count 14 in part alleges "a malicious use and abuse of process against plaintiff and an inequitable and illegal harassment of plaintiff through judicial proceedings."

Mr. Phillips is asserting claims of "malicious use of process," "abuse of process," "conspiracy to violate Rule 11," and "an inequitable and illegal harassment of plaintiff through judicial proceedings."

Each of these theories requires separate analysis. The law which must be applied is, of course, the law of the

Memorandum #29939 Filed May 8, 1964

State of New York since jurisdiction is based on diversity of citizenship and the acts constituting the tort, as well as the injury itself, took place within the state. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (1938).

The common law tort of malicious prosecution was originally restricted to relief from unjustifiable criminal litigation, but a majority of states have now extended that tort to ordinary civil actions. *Prosser, Law of Torts,* ¶99 (2d ed. 1955). When civil litigation is involved the term often applied is "malicious use of process." That is the term Mr. Phillips has used in count 2 of his fourth complaint.

Although New York still refuses the remedy for the ordinary civil suit, relief has been granted in certain exceptional cases. It is commonly stated in New York that to sustain a complaint based on malicious prosecution when civil litigation is involved, there must be an allegation that the plaintiff's person or property was interfered with in connection with the prior proceeding. See, *e.g., Black* v. *Judelsohn,* 251 App. Div. 559, 296 N. Y. S. 860 (1st Dep't 1937); *Schierloh* v. *Kelly,* 253 App. Div. 373, 2 N. Y. S. 2d 188 (2nd Dep't 1938); *Woodard* v. *Southampton Federal Savings & Loan Association,* 161 N. Y. S. 2d 522 (Sup. Ct. 1957).

For additional cases see, *Annot.,* 150 ALR 897, 902 (1944).

However recovery has been allowed in at least one case for an ordinary civil suit repeatedly initiated without ground although there was no interference with person or property. *Pangburn* v. *Bull,* 1 Wend., N. Y. 345 (1828).

Memorandum #29939 Filed May 8, 1964

Perhaps a more accurate statement of the rule in New York is as follows:

> "Damages are rarely recovered, however, for the malicious prosecution of a civil action, unless person or property is interfered with by some incidental remedy, such as arrest, attachment or injunction." *Burt* v. *Smith,* 181 N. Y. 1, 2, 73 N. E. 495 (1905).

(The same statement can be found in *Hubbard* v. *Banker,* 24 N. Y. S. 2d 289, 294 (County Court 1940), *aff'd* 260 App. Div. 901, 23 N. Y. S. 2d 198 (4th Dep't 1940)).

Plaintiff has failed to state any special circumstances which would take this case out of the general rule. Since no interference with person or property has been alleged, the claims of malicious prosecution must be dismissed.

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. *Assets Collecting Co.* v. *Myers,* 167 App. Div. 133, 152 N. Y. S. 930 (1st Dep't 1915).

In New York State abuse of process is generally said to require the same allegation of interference of person or property as does malicious prosecution. *Silverman* v. *UFA Eastern Division Distribution Inc.,* 135 Misc. 814, 236 N. Y. S. 18 (Sup. Ct. 1929); *Tricomi* v. *Tricomi,* 192 Misc. 763, 81 N. Y. S. 2d 750 (Sup. Ct. 1948); *Roberts* v. *B. Gertz Inc.,* 24 Misc. 2d 58, 203 N. Y. S. 2d 62 (Sup. Ct. 1960).

Memorandum #29939 Filed May 8, 1964

A possible exception to the general rule is found in the case of *Cardy* v. *Maxwell,* 9 Misc. 2d 329, 169 N. Y. S. 2d 547 (Sup. Ct. 1957), where a cause of action was found when the complaint alleged that the defendants threatened the plaintiff with adverse newspaper publicity unless he paid several million dollars to them to withhold further action by them. The *Cardy* case rests upon its own special facts, however. It appears to be an aggravated case to which the general rule does not apply. It is in that sense parallel to the *Pangburn* case, *supra.*

In the abuse of process count, just as in the count for malicious use of process, plaintiff has failed to state any special circumstances which would take this case out of the general rule.

Furthermore, abuse of process does not lie since the alleged bad faith on the part of the defendants was the institution of the action, not the abuse of the process of the court after it had been issued. See, *Assets Collecting Co.* v. *Myers,* 167 App. Div. 133, 152 N. Y. S. 930 (1st Dep't 1915); *Miller* v. *Stern,* 262 App. Div. 5, 27 N. Y. S. 2d 374 (1st Dep't 1941); *Lyons* v. *Scriber,* 174 N. Y. S. 332 (Sup. Ct. 1918); *Rubinstein* v. *Rubinstein,* 35 N. Y. S. 2d 926 (Sup. Ct. 1942).

Certain remarks in the *Lyons* case fit the case at bar exactly:

> "The only allegations in the complaint, which by any possibility related to acts subsequent to the issuance of the summons herein, are the statements of the publication of the particulars of the complaint and the verbal statements alleged to have been made by the

defendants after such publication. This was not abuse of process." (At p. 334).

The theories of "conspiracy to violate rule 11," and "an inequitable and illegal harassment of plaintiff through judicial proceedings," insofar as they are distinct from malicious use of process and abuse of process, are not recognized torts.

Counts 1, 2, 3 and 14, the malicious prosecution counts, must therefore be dismissed for failure to state a claim upon which relief can be granted.

Defamation

The 4th and 5th counts of the Amended and Supplemental Complaint purport to state causes of action for libel. The complaint shows that the alleged libelous statements were contained in a draft of a complaint delivered by attorney Adams (attorney for defendant John D. Murchison) to an attorney by the name of Holland (alleged to be an agent of Murchison). The 4th count relates to a complaint denominated the "Klafter complaint"; the 5th cause of action relates to a complaint denominated as the "Murchison complaint."

We have, therefore, a situation where on the face of the pleading one attorney delivered to another attorney a draft of a complaint. Each of these complaints was purportedly a derivative action on behalf of Alleghany Corporation against Phillips and against various other defendants. It was a draft of the complaint in an action on behalf of a corporation in which defendant Murchison was admittedly

a large stockholder and in which he had an important interest. It appears from Paragraph 9 of the complaint that attorney Holland thereafter composed a complaint, filed it in this court in such an action, and that in connection with the complaint filed by him he used the draft complaint hitherto referred to. It is alleged in Paragraph 13 that Holland acted as an agent of the defendant Murchison in this matter.

We have, therefore, in summary, this situation: that one attorney for defendant Murchison drafted a complaint and gave it to another attorney alleged to be an agent of defendant Murchison for his consideration in the institution of an action. These were steps which were preliminary steps in the course of taking a legal action. Whether the allegations in the draft complaint could be supported would, of course, be a matter for the subsequent judicial proceedings. It would be a strange situation if every time a defendant won a lawsuit he could sue his opponent for libel because his attorney consulted another attorney on the drafting of the complaint. It certainly could not be allowed that an attorney who consults his associate about the drafting of a complaint and shows him a draft of a complaint can be charged with libel if it subsequently turned out that the allegations could not be sustained at the trial. To apply any such rule would be utterly disruptive of legal proceedings and the proper representation of clients by their attorneys.

It is for this reason that there is an absolute privilege for statements made in the course of judicial proceedings if the statements are material or pertinent to the issues involved. *Youmans* v. *Smith*, 153 N. Y. 214, 47 N. E. 265 (1897); *People ex rel. Bensky* v. *Warden of City Prison*,

Memorandum #29939 Filed May 8, 1964

258 N. Y. 55, 179 N. E. 257 (1932); *Andrews* v. *Gardiner*, 224 N. Y. 440, 121 N. E. 341, 2 ALR 1371 (1918). This rule has been liberally construed so as to afford its protection not only to formal pleadings and affidavits, but also to communications between parties to the action and their attorneys. See, *Zirn* v. *Collum*, 187 Misc. 241, 63 N. Y. S. 2d 439 (Sup. Ct. 1946); *Di Tullio* v. *Deacy*, 16 Misc. 2d 565, 183 N. Y. S. 2d 585 (Sup. Ct. 1958).

The rule has also been applied to the printing and distribution of copies of proposed questions to be used in disbarment proceedings. *Youmans* v. *Smith, supra.*

The publication of a draft complaint is covered by the privilege. The drawing of drafts and their distribution among attorneys and clients are necessary steps in taking legal action.

The allegedly libelous material was clearly pertinent to the judicial proceedings which the attorneys Adams and Holland were thinking of instituting.

On the face of the complaint the alleged libelous matters were absolutely privileged under the circumstances set forth in the complaint. A trial on any such issue would inevitably result in dismissal of the complaint. There is no reason to burden this Court and the parties with long litigation where the outcome is so obvious. The 4th and 5th counts are dismissed for failure to state causes of action.

Counts 6, 7, 9, 10, 11 and 12 are based upon allegations of defamation. Counts 6 and 7 allege defamation by telephone calls to various newspapers. Counts 9, 10 and 11 allege defamation by the issuance of a press release to newspapers. Count 12 alleges defamation by distribution to vari-

ous persons of a copy of a complaint filed in this court, which plaintiff says was defamatory.

Under the circumstances of this case it may be dubious whether plaintiff will be able to establish the defamation which he alleges in the counts of the complaint. But this issue cannot be decided merely upon the face of the complaint. It must await further proceedings in the litigation. These counts of the complaint are inartistically drawn but they are sufficient to advise the defendants of the nature of the claims made and to define the issues with sufficient clarity to enable them to be tried.

So much of the motion as seeks to dismiss counts 6, 7, 9, 10, 11 and 12 of the complaint is denied.

Paragraphs 75 and 76 of the complaint are stricken pursuant to Rule 12(f) as immaterial, impertinent and scandalous. The allegations contained therein certainly have no part in this litigation.

Alleged Violations of the Securities Act

Counts 8 and 13 appear to claim damages for violations of the Securities Act, although it is difficult to ascertain from a reading of the complaint exactly what the contentions of the plaintiff are with reference to these counts. Insofar as these counts may relate to alleged defamation, his right of recovery is protected in the other counts of the complaint. Insofar as the counts may allege violations of the Securities Act, or the rules and regulations thereunder, plaintiff has alleged no facts sufficient to show any damage resulting to him personally by reason thereof. The meetings of stockholders concerning which proxies were solicited have been held. He did not seek to enjoin the use of the

Memorandum #29939 Filed May 8, 1964

proxies or to enjoin the holding of the meetings or the action taken thereat. For him to wait and now seek personal damages for alleged violations of the Securities Act is not justified. If there were any violation of the proxy rules, such violation cannot be said to be related in any way to the damages sought to be recovered by the plaintiff. *Cf., Mills* v. *Sarjem Corporation,* 133 F. Supp. 753, at p. 768 (D. C. N. J. 1955).

The motion to dismiss counts 8 and 13 of the complaint for failure to state a cause of action is granted.

So ordered.

Dated: New York, N. Y.
May 8, 1964

/s/ ARCHIE O. DAWSON
U. S. D. J.

—508-535—

Opinion Filed March 28, 1966

Randolph Phillips, plaintiff, pro se.

Townley, Updike, Carter & Rodgers, New York City, for defendant, John D. Murchison, J. Howard Carter, Lee W. Meyer, Ronald S. Daniels, Anson M. Keller, New York City, of counsel.

RYAN, *Chief Judge.*

Defendant John Murchison has moved under Rule 56(b) F. R. Civ. P. for summary judgment dismissing the amended and supplemental complaint with prejudice upon the ground that the matter complained of in the pending counts of the said complaint are absolutely privileged as a matter of law under Section 337 of C. P. A. (now Sec. 74 of the Civil Rights Law). This privilege has been pleaded as an affirmative defense to all counts.[1]

Plaintiff has moved for an order "vacating that part of this Court's memorandum and order of May 8, 1964 [by Judge Dawson] dismissing Counts 1, 2, 3, 8, 13 and 14 of the amended and supplemental complaint".

Although the suit is filed against Murchison brothers, individually and as a partnership, the only defendant who has been served and has appeared is John D. Murchison.

---

[1] Section 337 of the New York Civil Practice Act (now Section 74 of the Civil Rights Law) provides in relevant part:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published."

Opinion Filed March 28, 1966

The complaint rests on allegedly libelous newspaper reports but the alleged offending newspapers have not been sued. This is the fourth complaint since 1961 which plaintiff has filed in support of the charge that he was defamed —the three prior complaints were dismissed by Judge Dawson as were six counts of the fourth leaving for our disposition the 6th, 7th, 9th, 10th, 11th and 12th counts.

At the outset, we deny plaintiff's motion because this Court has no authority or power to review Judge Dawson's dismissal of these counts on May 8, 1964. That after his decision the Judge signed an order to show cause to reconsider Counts 8 and 13, which was never heard because of his death prior to its return date is no authority for reconsideration of his decision by me. I cannot say that Judge Dawson would have vacated his decision and reinstated these counts; the signing of the order to show cause was an indifferent judicial act of no determinative significance. It decided nothing—not even whether the Court would reconsider. In fact, examination of the reasons urged by plaintiff for reconsideration discloses nothing which in our opinion might have caused Judge Dawson to change his decision. J. I. Case Co. v. Borak, 377 U. S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 the authority relied on by plaintiff in support of his order to show cause does not validate these counts. Besides since Judge Dawson's death plaintiff has done nothing to bring the order to show cause on for hearing until defendant made the instant motion to dismiss the remaining counts. Now eighteen months later, plaintiff seeks reconsideration not only of Counts 8 and 13 but of the remaining ones, as to which he had never sought re-

consideration. Obviously, plaintiff thought as little of his chances of succeeding as we do. This motion is denied,—both procedurally and on the merits.

We turn now to defendant's motion and to the two questions which are determinative of its outcome,—whether the matter complained of was published in connection with a judicial proceeding and if so whether it fairly and accurately reported the proceeding. The first question can be resolved on the documents filed in connection with this motion; the second requires a comparison of the content of the judicial proceeding with the matter reported.

It is urged by defendant that the determination of both questions may be made by the Court as a matter of law because the question of whether the privilege attached is a question of law. Plaintiff urges that neither may be determined by the Court since underlying both are disputed issues of fact which require a trial.

The defamatory statements charged in this suit arise out of the reporting of commencement of two derivative stockholders suits on behalf of Alleghany Corporation against Phillips and others: one, the *Freeman* suit in the New York State Court and the other, the *Murchison* suit in this Court.

Specifically, the complaint alleges in the remaining counts before us, as follows:

Count 6 charges that plaintiff was slandered on September 7, 1960, when defendant's "agent" Holland (his attorney) telephoned the Wall Street Journal to report to it the institution of the *Freeman* suit, and that plaintiff was libeled by that paper's republication of the report on Sep-

tember 8, 1960. In this count plaintiff sets forth that part of the report which he charges was defamatory.

Count 7 charges that plaintiff was similarly slandered when Holland telephoned this information to the Herald Tribune on the same day, and that plaintiff was libeled when that paper republished this report on September 8, 1960. Again, plaintiff sets out that part of the report which he claims defamed him.

Count 9 charges that plaintiff was libeled by defendant when Hill & Knowlton, a firm of press agents acting on defendant's behalf, issued from their New York office a press release to newspapers and wire services in the State of New York and elsewhere in the United States, and to individuals in the State of New York and elsewhere in the United States, through the use of the mails and otherwise, which was headed "For: Murchison Brothers *For IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960*"; that by issuing said press release through Hill & Knowlton, Inc., defendant Murchison caused the substance of it to be published by newspapers, magazines, and wire services throughout the United States, thereby causing widespread and extensive circulation of the aforesaid false, malicious, and defamatory statements. This count goes on to recite the dismissal on the merits of the charges against plaintiff which had been so publicized in the press release, and the failure of defendants to cause a press release to be issued publicizing this decision of this Court, or communicating the decision of this Court to those newspapers which had reprinted defendants' press release.

The Tenth Count charges that plaintiff was defamed as a result of the republication of the press release of September 8, 1960 in the New York Times and in the New York World Telegram and Sun on September 9, 1960.

The Eleventh Count charges a similar defamation as a result of the republication of the press release in the Minneapolis Morning Tribune of September 9, 1960, which statements are alleged to have been telephoned to the newspaper by defendant or his agents in New York City to that paper's Business Editor in Minneapolis.

The Twelfth Count charges that the mailing on September 13, 1960, by defendant of copies of the Murchison complaint to his fellow directors throughout the United States and Canada constituted a libel and alleges as well that some of the allegations of the complaint itself were libelous.

No question is presented as to the defamatory nature of the statements pleaded in the complaint.[2]

In support of his position that there were judicial proceedings pending at the time of all publications complained of and that there is no question as to when these judicial proceedings began, defendant has submitted various affidavits based on personal knowledge. With respect to the *Freeman* suit against Phillips, Kirby and Ireland in the State Court there is an affidavit of Holland, attorney for the stockholder Freeman, which unequivocally states that

---

[2] "In short, and bluntly put, it is charged that for a price, Phillips sold out to Kirby and betrayed the interests of those he purported to represent, in advocating the acceptance of a separate settlement with Kirby for $1,100,000 when he knew the latter's liability in the lawsuits had been evaluated at $35,000,000, and that the sum of $1,100,000 was considerably less than Kirby would have had to pay in settlement except for the alleged corrupt conduct; that the conspiracy encompassed the lifting of the injunction of this Court, as well as the entry of an order of dismissal as to Kirby, which were achieved by the concealment of his alleged duplicitous conduct from both Courts." Murchison v. Kirby, D. C., 27 F. R. D. 14, 17 (1961).

he, Holland, personally served the *Freeman* summons and complaint upon Ireland and Alleghany on September 7, 1960, and that subsequent to this service he, Holland, telephoned the Wall Street Journal and New York Herald Tribune to inform them of the institution of this suit. The summons and complaint are attached as an exhibit and are dated and verified respectively September 7, 1960. There is no question that the date of the newspaper publications was September 8, 1960. Although no affidavit of service of the summons and complaint on Ireland and Alleghany has been submitted on this motion, the sworn statement of Holland, a member of the bar of this Court, and counsel for Freeman at the time, is supported by the report in the Wall Street Journal on September 8, 1960, that "Mr. Ireland confirmed he had been served with the suit, which is being brought in New York State Supreme Court." For this statement to have appeared in the paper, which was on public sale on the morning of September 8, 1960, it would have had to be printed at the latest the night of September 7, 1960, the day on which Holland says he served Ireland. The affidavit of Mr. Carter, attorney for defendant on this motion, adopts and reaffirms the statements in Holland's affidavit.

With respect to the Murchison suit filed in this Court against Kirby, Phillips and others, there is the affidavit of Huschle, an attorney in the office of the attorneys for Murchison in that suit (and present counsel) to the effect that he filed the complaint in this Court on September 8, 1960 sometime before 4:30 P.M. and that he reported the completion of such filing to a member of the firm. The records

of this Court established that this complaint was filed on that day. There is a further affidavit of Cheney, Vice-President of Hill & Knowlton, press agents for Murchison, stating that on September 8, 1960 he read the Murchison complaint and discussed its allegations with counsel for Murchison and prepared a press release to announce the commencement of the action, but that he was instructed not to and did not distribute the release until he had received word from counsel of the filing of the complaint. Mr. Carter's affidavit adopts and reaffirms these statements.

Opposed to these we have two affidavits of plaintiff and a Rule 9(g) statement reciting numerous facts as to which he says there is a genuine issue. We will consider only those that are relevant to this motion:

1. Whether or not the publications complained of in the 6th, 7th, 9th, 10th and 11th Counts were a "fair and true report of the judicial proceeding they purported to report."

2. Whether the statements in the affidavit of Holland as to the times of service of his complaint in the Freeman action and of his telephoned communications to the Wall Street Journal and the Herald Tribune are true.

3. Whether the statement in the affidavit of Cheney as to the time of his receipt of the Murchison complaint, his discussions with Murchison's attorneys, the preparation of the press release and its delivery to others is true.

4. Whether the statement in the affidavit of Huschle as to the time of the filing of the Murchison complaint and his notification to his office is true.

5. Whether the statements in the affidavit of Mr. Carter —referring to the above three affidavits are true.

Plaintiff's affidavits to support these issues insofar as relevant are to the effect that he denies the allegations in all the affidavits "as to the times of service of the complaints referred to, of the times of publication of the complaints referred to, and of the times of the discussions or reports therein referred to"; and that he "challenges their credibility with respect to their material allegations."

Further averments as to the time of the "filing" of the *Freeman* action in the State Court, and of the service upon him in *both* actions and of his opportunity to answer the complaints are totally immaterial to the question before us and do not challenge the facts relied on by defendant to support his motion.

It cannot be disputed (and plaintiff conceded this) that an action of the nature here involved is commenced in the New York State court by the service of the summons upon any one defendant, and in the Federal court "[a] civil action is commenced by filing a complaint with the court." (Rule 3 F. R. Civ. P.). The filing of the complaint in the *Freeman* suit in the State Court, and the service of a defendant with process in the Murchison suit in the Federal court is not required in the establishment of the pendency of a judicial proceeding. Once the pendency of the judicial proceedings has been established the privilege attaches irrespective of whether the proceedings were public knowledge or known to plaintiff. (Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153, 52 A. L. R. 1432).

Opinion Filed March 28, 1966

Plaintiff's denial is a group denial of the material allegations of the time of service and the telephone calls, lumped together so vaguely as to make it impossible to determine exactly what plaintiff is contesting. He denies "times of service of the complaints", which could include service of the Murchison complaint and which is not relevant; he denies "times of publication" which could include the telephone calls, as well as the press release, the discussions with counsel and the newspaper reports—some of which are incontestable. Although plaintiff has had more than five years in which to inform himself of the true facts relating to the time of service, the telephone calls, the discussions, etc. he has stated no facts to contradict counsel's sworn statements and the supporting exhibits.

Plaintiff seeks to create an issue of fact out of nothing more than his bald statement that there is an issue of fact as to the truthfulness or falsity of counsel's statements. All he discloses by this challenge to the credibility of counsel's statements is a baseless hope that by cross examination he will be able to establish that both former and present counsel for Murchison are not truthful. He has shown no facts which would form the basis for reaching the conclusion that counsel did not serve the summons and complaint in the *Freeman* suit when he swears he did. Certainly, this Court is not to conclude, without substantial basis for doing so that two members of its bar of experience and good reputation have perjured themselves and deceived the Court in order to gain some procedural advantage over their adversary. No genuine issue of the credibility of these witnesses requiring a trial has been raised;

summary judgment will lie in such case (Topp-Cola Co. v. Coca-Cola Co., D. C., 185 F. Supp. 700; Orvis v. Brickman, D. C., 95 F. Supp. 605, aff'd. 90 U. S. App. D. C. 266, 196 F. 2d 762; Scolnick v. Lefkowitz, 329 F. 2d 716, 2d Cir. 1964). To hold otherwise would mean that any time issue has been joined in an action, summary judgment will not lie. Rule 56(e) requires not a reassertion by the adverse party of his allegations or denials but a response by affidavits setting forth specific facts showing the issue which must be tried.

We find that there was a judicial proceeding pending at the time of the publications in the Wall Street Journal and the Herald Tribune, the libel alleged in Counts 6 and 7, and at the time that Holland telephoned these papers—the slander charged in Counts 6 and 7. It follows that we find that the republication of the press release in the World Telegram, the New York Times and the Minneapolis Morning Tribune of September 9, 1960 reporting the institution of the Murchison suit in this Court was made while there was a judicial proceeding pending, in view of the fact that complaint had been filed in this Court on September 8, 1960.

This brings us to Count 9, which as we have seen charges libel through the issuance and publication of the press release by defendant's press agent reporting the institution of the Murchison suit to the newspapers and their publication of it on September 9, 1960. The issuance of the press release to the newspapers is sworn by Cheney, the press agent, to have been made on September 8, 1960 after he had been advised by counsel for Murchison that the complaint had been filed. Again, plaintiff has submitted no

facts showing that there is a question as to when Cheney released the press release to the papers, and in fact under his very vague denial he has not ever concretely denied that the press release was in fact released following the institution of suit. Using the Cheney affidavit as a springboard, plaintiff in a belated attempt to immunize this Count 9 from the protection of a judicial proceeding, attempts to argue that he was libeled when counsel for Murchison prior to the filing of the complaint showed Cheney the complaint in order that he might prepare a press release. There is no question that Cheney did see the complaint prior to its filing—he has so sworn—as there is no question that plaintiff has nowhere charged that this disclosure by defendant to his press agent constituted the publication complained of by him. It is unnecessary for this Court to determine whether publication by a party to a press agent under contract to the party for the purpose of having him prepare a press release of a contemplated judicial proceeding is protected or actionable. Plaintiff has repeatedly described his count as charging "publication of defamatory matter by press release throughout the United States" and cites Munafo v. Helfand, D. C., 140 F. Supp. 234, 237 for the proposition that "delivery of the press release to the newspapermen was publication in and of itself," making it quite clear that this is the publication complained of and not the prior one by counsel to Cheney.

We find that publication of the press release by Cheney to the newspapers was made when there was a judicial proceeding pending and that it was therefore privileged.

After four complaints and six years there would be no reason to permit the filing of an amended count charging

libel by publication to defendant's agent in view of the fact that such a claim is barred by the one-year statute of limitations, (CPLR 215 (C. P. A. §51(3)) that it may not relate back to the libel now pleaded (Hartmann v. Time, Inc., 3 Cir., 166 F. 2d 127, 1 A. L. R. 2d 370) and that the damage, if any, suffered by plaintiff arose not from the publication by defendant to its press agent, but rather from the publication by the defendant's agent to the newspapers.

The second question to be determined with reference to all the remaining counts is whether the publications—the telephone call, the press release and the newspaper reports—fairly and truly reported the judicial proceedings we have found pending. The resolution of this is essential not because plaintiff has charged that they were not fair and true reports, for he has not done so, but because this is the other statutory requirement, which must be met before the privilege attaches. The ultimate question of application of the statute to the publication is of course one of law for the Court, but the primary one of fairness and truth may or may not present a question of fact which might require a hearing before the statute may be applied.

Whether such a factual issue exists can be determined only from an examination of the evidence before the Court—that is, the complaints which form the basis of the judicial proceedings and the language employed to report them. Obviously if the reports were verbatim reprints of the complaints, the matter would end there, but they are not and it is necessary therefore to compare the reports with the complaints in order to determine whether there

is an issue as to their fairness and truthfulness. The complaints, the press release and the newspaper reports are before the Court—they are undisputed. No claim is made that the telephone calls made by Holland, which form the basis for plaintiff's claim of slander in Count 6, published matter other than that which appeared in the newspaper reports, which are undisputed, so that as to this charge of slander no issue is presented. That the Court may make the determination is established. Gregory v. Daily Gazette Co., 22 A. D. 2d 846, 254 N. Y. S. 2d 66.

> "Where as here and as conceded by the parties, all of the essential facts appear in the pleadings and the only question is a question of law as to whether the publication is a fair report of court documents atttached to the complaint, judgment on the pleadings is proper." Schachter v. News Syndicate Co. Inc., 270 App. Div. 378, 380, 59 N. Y. S. 2d 693, 694 (1st Dept. 1946.)

In George v. Time Inc., 259 App. Div. 324, 19 N. Y. S. 2d 385, 386, App. Div. 1st Dept. 1940, it was held that "• • • on the undisputed facts in this record as to the content of the Circuit Court's opinion (the judicial proceeding), and the language used by defendant in reporting it, the issue as to whether the article was a fair and true report was an issue of law for the court."

This is in accord with Seelman, Libel and Slander in the State of New York (rev. ed. 1964) at p. 278 where the law of New York is tersely stated that:

> "Where the question of fair report arises solely from the publication of the contents of legal documents; or

upon undisputed testimony of the court occurrence, it is for the court to decide."

The question of malice, a true question of fact, does not defeat the privilege; its resolution therefore even if pleaded is not necessary to an application of the privilege (Kelley v. Hearst Corp., 2 A. D. 2d 480, 157 N. Y. S. 2d 498; Farrell v. New York Evening Post, 167 Misc. 412, 3 N. Y. S. 2d 1018 (Sup. Ct. N. Y. Co. 1938)).

The entire reports must be read, but the following excerpts illustrate their overall nature.

The Wall Street Journal report (Exhibit "2") pleaded in the 6th Count has the lead caption:

"TWO MINORITY HOLDERS SUE, KIRBY, OTHER TOP OFFICERS OF ALLEGHANY

Suit Charges He gave R. Phillips Seat on I. D. S. Board. Got Favorable Settlement of '55 Suit

There follows a synopsis of what the *Freeman* suit charges and who are named as defendants. It goes on to quote both defendants—Ireland that the charges were ridiculous and a statement to the effect that he had been served and by Phillips that he had not been served and that he was not going to be intimidated or coerced from performing his duty in spite of the charges made against him; the report also quotes Murchison on charges of wrongdoing made against him by stockholders of I. D. S.

The report in the Herald Tribune ((Exhibit "3"), the 7th Count) bears the caption

"ALLEGHANY FACED BY NEW SUIT INTEREST CONFLICT CHARGE LEVELED."

and describes the suit as a battle between millionaires (Kirby and Murchison) for control of Alleghany; then quoting from the complaint it says that the suit charged that Kirby entered into a "secret agreement and conspiracy" with Phillips to procure favorable settlement of another suit in return for a promise to Phillips of "certain perquisites", among which were that Phillips would be named a director of I. D. S. with a salary and expense account. Under a subheading "Payment Held Inadequate" Phillips is quoted as saying that he had requested the removal of the Murchisons for wrongdoing, and that he would not be intimidated or coerced from performing his duties to the I. D. S. stockholders.

The press release ((Exhibit "5"), Count 9), bears the heading

> "FOR: MURCHISON BROTHERS FOR IMMEDIATE RELEASE: THURSDAY, SEPTEMBER 8, 1960"

and begins by stating that Murchison and others had charged defendants and Phillips with conspiracy to defraud the courts and Alleghany; it then continues with a summary of the complaint "filed in the United States Southern District Court", quoting from it that it alleges that Phillips was to receive "a position of prominence as a director or officer of I. D. S., ALLEGHANY or one of its affiliates,", adding in parentheses and not quoting that ("Phillips is now a director of I. D. S."). It also quotes from the complaint that he would be a "salaried consultant to Alleghany or one of its affiliates" and not quoting, in parentheses

("Phillips is now on the payroll of I. D. S. as a consultant at $2,500. monthly.").

The report in the World Telegram ((Exhibit "6"), Count 10) under the heading "MURCHISONS JOIN FIGHT FOR ALLEGHANY CONTROL" reports on the contest between the Murchisons and Kirby for control of Alleghany and describes very briefly the suits filed in the State and the Federal Courts saying that they charged that defendants Kirby, Ireland and Phillips "conspired to put over on the federal and state courts a fraudulent settlement" and that Kirby "made a secret agreement to reward Phillips with a directorship and a job".

The report in the New York Times ((Exhibit "7"), Count 10) under the caption

> TWO ADDITIONAL LAWSUITS FILED AGAINST OFFICIALS OF ALLEGHANY

is even briefer; it summarizes the two complaints as charging "a secret agreement and conspiracy" among the three defendants and a "fraud on the courts" in a "secret agreement between Phillips and Kirby."

The report of the Minneapolis Morning Tribune ((Exhibit "8"), Count 11) carries the by-line

> MURCHISONS CHARGE CONSPIRACY IN ALLEGHANY CORP. SETTLEMENT

and among paraphrases of the allegations of the complaint makes the following statements of plaintiff describing him as "a leader in the suits against the management of Alleghany" and since the settlement "active in Alleghany af-

fairs," "a director of IDS * * * and chairman of the IDS law and finance committee" and "a leader in the recent shakeup of the management of IDS". It further quotes from the complaint that "Phillips in collaboration with Ireland was to use the position created for him in Alleghany or I. D. S. to harass and discourage any opposition to Kirby within the management or among the stockholders of I. D. S.," and that "Phillips now is receiving $2,500. a month from I. D. S. for services as a consultant."

A comparison of paragraphs of the complaints with the reports leaves no doubt that far from imputing greater turpitude to plaintiff than do the judicial proceedings, they are very restrained in accurately summarizing the content of these proceedings. The emphasis is on Kirby and Murchison, rather than on Phillips, who is made to appear as a weapon in the hands of Kirby in his battle against Murchison, which had for long occupied the attention of the press and the public. The language travels very closely on the language of the complaints and where it does not there are no words used which might be susceptible of charging plaintiff with greater wrongdoing than do the complaints.

Plaintiff really does not dispute the fairness and truthfulness of the language used, but rather relies on legal arguments to destroy privilege. Thus, he says that the language of the press release is not privileged because it contains factual statements which are not reported as allegations of the complaints, and he points to the language found in parentheses in the press release.

There are two answers to this argument—one is that although not reported as a charge in the complaint, these two statements were in fact allegations of the complaints,

and the second is, that even if they were not, if they were true and not in themselves libelous they would not destroy the privilege. That a statement of fact is interspersed among a report of judicial proceedings does not deprive the report of the protection of the statute so long as the statement does not affect its truthfulness or fairness (Briarcliff L. Hotel v. Citizen-Sentinel Publishers, 260 N. Y. 106, 183 N. E. 193). So too, the headings or lead lines of the reports themselves are protected if they are fair and true headnotes of the statements published. Here, the headings are no more than an index of what appears in the context below; and only one refers to plaintiff! The Wall Street Journal states that Kirby is charged with having given plaintiff a seat on the I. D. S. Board and with having obtained a favorable settlement of the stockholders' suit. Nothing could be a more accurate or fairer summary of what was charged in the complaints.

Plaintiff's other argument is that the privilege is defeasible because defendant failed to publish his subsequent vindication, and that the report therefore was not full, fair or impartial.

The report here was co-extensive with the judicial proceeding—only the complaints were then in existence and that is what was reported. It was as complete as could be and that is when the privilege attached, not years later; it was not destroyed because the charges ultimately were not sustained. Dismissal of the charges did not render the charges in the complaint non-existent as a record in a judicial proceeding. George v. Time, Inc., supra; Campbell v. New York Evening Post, supra. There is no principle

of law which so eradicates the privilege which has attached because of subsequent events.

Plaintiff's next argument is undeserving of much comment. If the report is privileged because made in connection with a judicial proceeding, it matters not what its source is. The report determines the privilege, not its source, so that it is immaterial whether the newspapers (who are not the defendants here) obtained their information directly from the complaints. Murchison, the defendant, and his agent obviously did obtain the information from that source.

Plaintiff finally urges that the privilege does not apply to the Murchison action because the publication was by Murchison a party to the complaint. But, the statute immunizes "any person" including parties to the litigation (Lewis v. Chemical Foundation, 262 N. Y. 489, 188 N. E. 33; Robinson v. Battle, 148 App. Div. 230, 133 N. Y. S. 57; Oglesby v. Cranwell, 250 A. D. 720, 293 N. Y. S. 67).

Reaching at long last Count 12, it is clear that the mailing of the copies of the complaint by Murchison to his fellow directors was on September 13, 1960 long after its filing was completely privileged as a publication of a judicial proceeding. No question of fairness or truth is presented here since the publication was of the complaint itself. Plaintiff has again argued that the Civil Rights Law of New York does not apply to the out of state publications alleged in the 11th and 12th Counts. This was an argument raised before Judge Dawson in support of plaintiff's prior motion to strike the defense of privilege under New York law, and rejected by Judge Dawson on defendant's allegation that the judicial proceedings were pending here, and

that the publications emanated from New York, where plaintiff was resident and where damage, if any, was inflicted. This is where the tort was committed, but even if it were not, the New York law would still apply as the place having the most significant relationship with the occurrence (Babcock v. Jackson, 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279, 95 A. L. R. 2d 1; King v. Hildebrandt, 2 Cir., 331 F. 2d 476; Restatement of Conflicts, 2d Sec. 379(e)).

The motion to dismiss Counts 6, 7, 9, 10, 11 and 12 and to enter judgment for defendant is granted upon the complete defense at law that the alleged defamations were absolutely privileged. The Clerk is directed to enter judgment of dismissal of these remaining counts with costs and with prejudice;

So ordered.

Dated: New York, N. Y.
March 25, 1966

/s/ SYLVESTER J. RYAN
United States District Judge

—536—

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civil 713

RANDOLPH PHILLIPS,

Plaintiff,

—vs.—

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., individually and as persons doing business under the firm name and style of MURCHISON BROTHERS,

Defendants.

The defendant John D. Murchison, the only defendant having been served and having appeared in the above entitled action having moved for summary judgment pursuant to Rule 56 (b) Federal Rules of Civil Procedure to dismiss Counts 6, 7, 9, 10, 11 and 12 of the amended and supplemental complaint, the only remaining counts herein, and the plaintiff having moved for an order vacating the order of this Court dated May 8, 1964 with respect to the dismissal of Counts 1, 2, 3, 8, 13 and 14 of the amended and supplemental complaint, said motions having come on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, and the Court thereafter having handed down its opinion filed on March 28th 1966 denying plaintiff's motion and granting the defendant's motion with prejudice and with costs, it is

Judgment

ORDERED, ADJUDGED and DECREED: That the defendant JOHN D. MURCHISON have judgment against the plaintiff RANDOLPH PHILLIPS dismissing the amended and supplemental complaint with prejudice and with costs.

Dated; New York, N. Y.
March 28, 1966

JOHN J. OLEAR, JR.
Clerk